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No. 79-678

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SAN DIEGO GAS & ELECTRIC CO.,
Appellant,

v.

CITY OF SAN DIEGO, *et al.*,
Appellees.

On Appeal from the Court of Appeal
of the State of California

BRIEF OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL ASSOCIATION OF COUNTY PLANNING DIRECTORS, NATIONAL WILDLIFE FEDERATION, PRESERVATION ACTION, AND NATIONAL PARKS AND CONSERVATION ASSOCIATION AS AMICI CURIAE IN SUPPORT OF APPELLEES

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QUESTION PRESENTED

Whether, when a regulatory ordinance not intended to condemn property is found to burden property unconstitutionally, state courts must award damages or whether they instead may award appropriate declaratory or injunctive relief to insure that the property involved is not impermissibly burdened?

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INTEREST OF AMICI

Pursuant to Supreme Court Rule 42(2), the above-listed organizations file this brief as Amici Curiae in support of Appellees. Letters of consent from counsel for the parties have been filed with the Clerk.

Amici are concerned with the protection and promotion of the natural and built environment and with land use regulation and planning. Amici have a combined U.S. member-

ship of nearly three million, and have a major interest in the encouragement of environmentally and economically sound land use policies. A more detailed description of each Amicus appears in Appendix A to this brief.

SUMMARY OF ARGUMENT

Amici believe that no "taking" has occurred in this case, and fully support the arguments made on that issue by Amici Curiae Conservation Foundation *et al.* in their brief. In the event that, as Amici believe appropriate, this Court affirms the decision below on the "taking" issue, consideration of the remedy issue will be unnecessary.

Amici submit that the decision of the California court on the remedy issue should be affirmed for a number of important reasons.

First, there is no precedent for an "inverse condemnation" damage remedy in the context of an overly burdensome regulatory scheme.

(a) In no case has this Court ever upheld an award of damages on the theory of "inverse condemnation" by a regulation. Instead, the uniform result has been to tell the agency involved it could not proceed unless it paid compensation. *E.g., Kaiser Aetna* v. *United States,* 444 U.S. 164 (1979) (regulation found to be "taking" and enforcement of Corps of Engineer's order denied); *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393 (1922) (regulation found unconstitutional and enforcement enjoined). The supposedly contrary cases cited by the Appellant and its supporters uniformly hold that where the United States intends to pay for a legislative scheme if necessary, and the Tucker Act is available for a damage remedy, an injunction will not issue. These cases thus support judicial deference to the legislative decision as to whether to regulate or condemn, but surely do not suggest that damage remedies are appropriate against the legislative will.

(b) Virtually all the other states which have specifically considered this issue have concluded, as has California, that in circumstances similar to those here no "inverse condemnation" damage remedy is available for an unconstitutionally burdensome regulation. Thus, the California court's decision is fully consistent with the position of the highest courts in most states that have considered the question. *See, e.g., Eck* v. *City of Bismarck,* 283 N.W.2d 193, 200 (N.D. 1979); *Holaway* v. *City of Pipestone,* 269 N.W.2d 28 (Minn. 1978); *Fred F. French Investing Co.* v. *City of New York,* 39 N.Y.2d 587, 385 N.Y.S.2d 5, 350 N.E.2d 381, *appeal dismissed,* 429 U.S. 990 (1976).

(c) *Bivens* v. *Six Unknown Named Agents,* 403 U.S. 388 (1971); *Davis* v. *Passman,* 442 U.S. 228 (1979); and *Carlson* v. *Green,* 100 S. Ct. 1468 (1980), do not support a constitutional damage remedy here. Those cases indicate that a constitutional damage remedy may be implied where injunctive relief would be futile and no considerations of federal-state relations or other "special factors" are involved. In the present case, however, injunctive relief is entirely adequate. Since the gist of the complaint is failure to allow development, an order striking down an ordinance and requiring that a project proceed will fully vindicate the Appellant's rights. *See Pamel Corp.* v. *Puerto Rico Highway Authority,* 621 F.2d 33, 36 (1st Cir. 1980). Moreover, as discussed below, land use regulations involve precisely those "special factors" and "financial policy" considerations *Bivens* and *Carlson* indicate are reasons to avoid a damage remedy.

Second, implying a damage remedy would significantly interfere with the relationship between the courts and the legislative branch, especially at the state and local level. *See National League of Cities* v. *Usery,* 426 U.S. 833 (1976). This Court has repeatedly held that the state's legislative declaration of the public interest is "well-nigh conclusive" because state and local governmental leglislative bodies

are far better situated to determine the "necessity, character and degree of regulation," if any, which is appropriate in a particular circumstance. *Berman* v. *Parker,* 348 U.S. 26, 32 (1954); *Gorieb* v. *Fox,* 274 U.S. 603, 608 (1927). For that reason, this Court has consistently deferred to the legislature on the provision of remedies, particularly where they involve major financial commitments. *Compare Bivens* v. *Six Unknown Named Agents, supra; Dugan* v. *Rank,* 372 U.S. 609 (1963).

In the present case, Appellant seeks nothing less than a court declaration that the City of San Diego has purchased its property despite the fact that San Diego had no intent to do so and, indeed, that the California enabling legislation under which San Diego acted specifically precludes the City from using its open space zoning power to burden property unconstitutionally. Such a result would be unprecedented, unwarranted, and unwise.

Third, a constitutional damage remedy would cause wholesale disruption of government resources and greatly inhibit legitimate regulation, particularly, but not exclusively, in the land use area.

(a) The remedy Appellant seeks would likely cause staggering financial dislocation to already overburdened government units in instances when they have not knowingly committed their limited resources. For example, in *Horizon Adirondack Corp.* v. *State of New York,* 88 Misc. 2d 619, 388 N.Y.S.2d 235 (1976), the court rejected an "inverse condemnation" damage claim in part because of the tremendous financial impact—over $500 million in total—which could have resulted from such a decision. Moreover, the same problems would extend well beyond the land use area. Thus, under the rule sought by Appellants, had this Court not rejected in *Andrus* v. *Allard,* 444 U.S. 51 (1979), a claim that the impact of the regulatory provisions of the Migratory Bird Treaty Act upon sellers of Indian artifacts containing certain bird feathers was a

"taking," presumably Congress would have purchased all the Indian artifacts in the United States containing bird feathers, surely not what Congress had in mind.

(b) The effect of a mandatory damage remedy will be to discourage legitimate regulation, particularly since determining in advance whether a regulatory scheme will be held overburdensome as applied in every particular instance is often impossible. This Court's decisions have noted the importance of avoiding this type of impact on the other branches of government. *Compare Scheuer* v. *Rhodes,* 416 U.S. 232, 241 (1974); *Butz* v. *Economou,* 438 U.S. 478, 503, 506 (1978).

For all these reasons, the decision of the California court should be affirmed.

ARGUMENT

Amici believe that no "taking" has occurred in this case, and fully support the arguments made on that issue by Amici Curiae Conservation Foundation *et al.* in their brief. In the event that, as Amici believe appropriate, this Court affirms the decision below on the "taking" issue, consideration of the remedy issue will be unnecessary.

A. The Precedents Do Not Support an "Inverse Condemnation" Damage Remedy

1. *There is no precedent and no foundation in this Court's precedents for requiring a damage remedy.* Over the years this Court has considered the constitutionality of regulatory schemes in a number of cases in which the owner of real or personal property has contended that the regulation on its face or as applied was unconstitutionally burdensome. From time to time the Court has held that a particular regulation went "too far" and thus constituted a "taking." *E.g., Kaiser Aetna* v. *United States,* 444 U.S. 164 (1979); *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393 (1922).

Appellants (App. Br. at 39-41) and their supporters (*e.g.*, National Forest Products Association ("NFPA") Br. at 7-9) quote these cases, a number of eminent domain cases, and the language of the just compensation clause as support for a damage remedy. They conclude that the use of the term "taking" is a recognition that an overly burdensome regulation is equivalent to an exercise of the eminent domain power for which the state simply omitted to provide the payment required by the Just Compensation Clause. Appellant argues that the courts should remedy this defect and enforce the regulation as the equivalent of an exercise of eminent domain. (App. Br. at 19, 41).

This argument is little more than a play on words. As has been regularly recognized, the use of the term "taking" in this Court's decisions, *Pennsylvania Coal* v. *Mahon, supra,* included, is simply a shorthand for an impermissible use of the police power, not a reference to the eminent domain power. *See Pamel Corp.* v. *Puerto Rico Highway Authority,* 621 F.2d 33 (1st Cir. 1980); *Fred F. French Investing Co.* v. *City of New York,* 39 N.Y.2d 587, 385 N.Y.S. 2d 5, 350 N.E.2d 381, *appeal dismissed,* 429 U.S. 990 (1976); Nichols, *Eminent Domain* § 1.42(1), at 1-116, 1-121 (rev. 3d ed. 1979). As the First Circuit quite correctly observed in *Pamel*:

> "A zoning regulation that exceeds the permissible bounds of the police power does not in reality confiscate the property, but regulates with oppressive or arbitrary severity . . . . [The] court does not declare that an offensive zoning regulation has taken the property, but that the government cannot impose the restriction without formally paying for it." 621 F.2d at 35-36.

In no case has this Court ever held that, where legislation intended only to regulate did unconstitutionally overburden property, the governmental agency involved must proceed with its regulatory plans and pay compensation. Indeed, the uniform result has been to tell the agency involved

that it could not proceed in the absence of compensation. Thus, the governmental unit has been required to abandon its regulatory scheme and to institute eminent domain proceedings if it chose to do so. This Court's recent decision in *Kaiser Aetna, supra,* reached exactly that conclusion.[1]

Amicus National Association of Manufacturers ("NAM"), however, claims to have found several decisions of this Court which "are well nigh dispositive" support for damages as the proper remedy of owners of "taken" property. (NAM Br. at 10). In fact, the cases cited by the NAM stand for no such proposition.[2] They are cases in which

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[1] Kaiser Aetna had dredged a channel from its private pond to the ocean. The Army Corps of Engineers claimed that as a result the pond had become part of the navigable waters of the United States so that Kaiser Aetna could no longer preclude public access to the pond. This Court held that "the Government's attempt to create a public right of access to the improved pond goes so far beyond ordinary regulation or improvement for navigation as to amount to a taking under the logic of *Pennsylvania Coal Co.* v. *Mahon.*" 444 U.S. at 178. Having so concluded, it is noteworthy that this Court did *not* order the Corps of Engineers to make payment to Kaiser Aetna. Quite the contrary, the Court held that the government could not require public access to the pond without first bringing a separate proceeding in eminent domain and paying just compensation. 444 U.S. at 180.

[2] The cases cited by the NAM are *Hurley* v. *Kincaid*, 285 U.S. 95 (1932) (Mississippi River Flood Control Act, 45 Stat. 534, which provided for construction of levees and floodways, could not be enjoined pending compensation due, if any, since the Act authorized condemnation of flowage right over Kincaid's lands; sole remedy is the Tucker Act, 28 U.S.C. § 1491); *Dugan* v. *Rank*, 372 U.S. 609 (1963); *Fresno* v. *California*, 372 U.S. 627 (1963); and *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725 (1950) (all involving the California Central Valley Project initially established by the Emergency Relief Appropriation Act of 1935, 49 Stat. 115, in which Congress specifically provided for the purchase of water rights and authorized millions of dollars for such purchase by way of appropriation; not surprisingly, the Court concluded that the Tucker Act and the Reclamation Act, 43 U.S.C. §§ 371 *et seq.*, authorized the award of compensation for any "taking" and in-

this Court held that where the United States intends to carry out a congressional program and to pay any required compensation, the Tucker Act authorizes payment and injunctive relief is therefore not appropriate. Indeed, it is noteworthy that in each of these cases the United States argued in this Court that it was determined to carry out the plan involved and that it would pay compensation rather than have the regulatory scheme set aside. Thus, these cases actually stand for the proposition, discussed in detail below, that the courts must accord to the legislative branch the right to determine whether to proceed with the plan involved and pay compensation or drop the scheme.

2. *Virtually all state courts to consider the issue have reached the same conclusion as the California courts.* A number of the Appellant's supporters attempt to portray the California decision in the present case as a sport, out of touch with the decisions in state courts elsewhere in the country. (*E.g.*, National Association of Homebuilders ("NAHB") Br. at 25-28; NAM Br. at 19.)[3]

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junctive relief would be inappropriate); *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974) (where Congress intended to reorganize the northeastern railroads under the Rail Act, 45 U.S.C. §§ 701 *et seq.*, the Tucker Act provides a just compensation remedy for any "taking" of property and the reorganization cannot be enjoined).

[3] While for the reasons set forth in this brief Amici believe the California courts are correct, there is support for the proposition that a uniform remedy is not required:

> "Remedies X and Y may each satisfy the minimum requirements of the Constitution in the degree to which they implement a Constitutional right. If so, the Constitution permits a choice." A. Hill, *Constitutional Remedies*, 69 Colum. L. Rev. 1109, 1118 (1969).

See also A. Hill, *The Bill of Rights and the Supervisory Power*, 69 Colum. L. Rev. 181, 182-93 (1969); *cf. Baker* v. *Carr*, 369 U.S. 186, 236-37 (1962); *Pruneyard Shopping Center* v. *Robins*, 100 S. Ct. 2035 (1980) (California may provide limits on property rights different from the federal Constitution).

In fact, however, virtually all the state courts to consider the issue have taken the same view as California. A number of the recent state court holdings disallowing "inverse condemnation" damages as a general rule for allegedly overburdensome land use regulation are discussed in the note below.[4] Thus, in most other states, as in California, the rule is that injunctive or declaratory orders of one type

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[4] See the following cases:

Eck v. *City of Bismarck*, 283 N.W.2d 193, 201 (N.D. 1979) (a zoning ordinance limiting plaintiff's land to agricultural uses precluded a planned residential development; the court held that "absent a land-use regulation exceedingly onerous on its face, actual physical conduct inconsistent with the property rights of the landowner, or governmental precondemnation regulatory activity designed to facilitate subsequent eminent-domain proceedings, an action for 'inverse condemnation' [*i.e.*, damages] is inappropriate to challenge the validity of a zoning ordinance");

Gary D. Reihart, Inc. v. *Township of Carroll*, 409 A.2d 1167 (Pa. 1979) (where property owner seeks to establish land use restrictions as unreasonable, injunctive and declaratory relief are available; there is no damage remedy for the supposed "taking");

Holaway v. *City of Pipestone*, 269 N.W.2d 28, 30-31 (Minn. 1978) (a downzoning case in which the court concluded that "a writ ordering the initiation of condemnation proceedings is an inappropriate remedy to grant to a plaintiff who succeeds in establishing that a zoning ordinance has strayed beyond mere regulation. Instead, we think such an ordinance should be declared invalid and its enforcement enjoined");

Davis v. *Pima County*, 121 Ariz. 343, 590 P.2d 459, 460 (Ariz. App. 1978), *cert. denied*, 442 U.S. 942 (1979) (county refused to rezone property from rural to residential and the plaintiff sought both declaratory relief and damages; the court held that the "sole remedy" for an overburdensome zoning regulation was "the undoing of the wrongful legislation and not money damages");

Fred F. French Investing Co. v. *City of New York, supra* (ordinance severely restricted use of Manhattan property; the court held the regulation invalid and struck it down but specifically refused to allow a damages remedy);

Gold Run, Ltd. v. *Board of County Commissioners*, 554 P.2d 317, 318-19 (Colo. App. 1976) (county refused to rezone mountain

or another are the only appropriate relief in the usual case where a zoning or land use restriction is claimed to be unconstitutional on its face or as applied.

Of course, in California as elsewhere damage awards are available for physical "takings" and attempts to depress the market price for future condemnation. *See, e.g., Klopping* v. *City of Whittier*, 8 Cal. 3d 39, 104 Cal. Rptr. 1, 500 P.2d 1345 (1972); *Pan Pacific Properties, Inc.* v. *County of Santa Cruz*, 81 Cal. App. 3d 244, 254, 146 Cal. Rptr. 428, 434-35 (1978).[5] No such claims are made here.

3. *Bivens does not suggest the appropriateness of a damage remedy.* In *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), this Court implied a damage remedy under the Fourth Amendment. More recently in *Carlson* v. *Green*, 100 S. Ct. 1468 (1980), and *Davis* v. *Passman*, 442 U.S. 228 (1979), the Court implied damage remedies under the Eighth Amendment for failure to provide timely medical treatment to a prisoner and under the Fifth Amendment for sex discrimination. However, in *Lake Country*

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property from agricultural to residential and the court held that declaratory relief or certiorari review were the only remedies);

Mailman Development Corp. v. *City of Hollywood*, 286 So.2d 614, 615 (Fla. App. 1973), *cert. denied*, 419 U.S. 844 (1974) (city downzoned property to reduce the number of residential units by nearly 60 percent; court held "inverse condemnation" [*i.e.*, damages] was not allowed as a remedy even if the zoning ordinance were invalid); and

Visidor Corporation v. *Borough of Cliffside Park*, 48 N.J. 214, 225 A.2d 105 (1966), *cert. denied*, 386 U.S. 972 (1967) (city regulation limiting access to tavern can be attacked in injunctive suit but damages are not available).

[5] A number of Appellant's supporters argue that the California courts have "absolutely" prohibited damage awards in all cases, and that even if damages are not generally appropriate, this "absolutist" approach violates the notion that "taking" cases must be decided on a case-by-case basis. (*E.g.*, NAHB Br. at 23-24.) As discussed above this contention is simply based on an incorrect premise.

Estates, Inc. v. *Tahoe Regional Planning Agency,* 440 U.S. 391, 398-400 (1979), and *Agins* v. *City of Tiburon,* 100 S. Ct. 2138 (1980), this Court left open the question as to whether there is such a constitutional damage remedy for an overly burdensome land use regulation.

Amici believe that the logic of *Bivens, Passman* and *Carlson* makes it clear that the damage remedy allowed in those cases would be inappropriate here.

First, damages were the only possible remedy in those cases. Bivens had supposedly been unlawfully arrested and his house ransacked by federal agents. Davis claimed that she was fired by ex-Congressman Passman solely on the basis of her sex. Green's son allegedly died because federal prison officials did not bother to provide timely medical treatment. Injunctive or other prospective relief was obviously of no use, since the damage to Bivens and Green's son had all taken place and Davis could not be reinstated because Passman was no longer a Congressman. As the Court noted in *Davis*:

> "[T]here are available no other alternative forms of judicial relief. For Davis, as for Bivens, 'it is damages or nothing.'" *Davis* v. *Passman, supra,* 442 U.S. 245.

See also Butz v. *Economou,* 438 U.S. 478, 504-05 (1978).

In the present case, on the other hand, the gist of the claim is that Appellant has been wrongfully precluded from industrial development on its property. This Court has already ruled that delays in development because of the regulatory process are "incidents of ownership" for which no remedy is appropriate and cannot amount to a "taking." *Agins* v. *City of Tiburon, supra,* 100 S. Ct. at 2142-43 n.9 (1980). Thus, injunctive relief ordering San Diego to allow Appellant to develop its property in accordance with the earlier zoning would be a full remedy. Moreover, injunctive relief is typically all that is needed in land use regulation cases. *See Pamel Corp.* v. *Puerto Rico Highway Authority,*

supra, 621 F.2d at 36; Note, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance*, 26 Stan. L. Rev. 1439, 1452 (1974).[6]

Appellant and its supporters contend that injunctive relief is not useful because, if the courts strike down a regulation, under *Selby Realty Co.* v. *City of San Buenaventura*, 10 Cal. 3d 110, 109 Cal. Rptr. 799, 514 P.2d 111 (1973), the municipality may simply enact another regulation and start over. (App. Br. at 43-44; NAM Br. at 21). However,

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[6] Although they do not specifically rely on *Bivens*, *Passman*, or *Carlson*, Appellant and its supporters claim that damages should be allowed as a remedy because, at least in California, there is no other remedy available. For example, the NAM cites a series of cases which it claims show that California courts—both state and federal—have upheld against invalidation regulations which Appellant and its supporters insist are outrageously burdensome. (NAM Br. at 6 n.6, 20-22). Indeed, the NAM claims that no land use regulation has been invalidated by the California state courts in the past 20 years. (NAM Br. at 21). But the heart of the matter is that in the various cases cited by Appellant's supporters the California courts have found there was no "taking." If those cases are wrongly decided, the decisions should be reviewed and reversed. But the fact that California courts refuse to find "takings" where Appellant and its supporters feel they should obviously furnishes no ground for the creation of a damage remedy. If the California courts find there is no "taking," Appellant and its friends will have no relief whatever remedies are theoretically available.

Moreover, the NAM has its facts wrong. While Amici have not attempted a systematic survey of all California cases on land use regulation, Amici are aware of at least five cases within the past seven years in which the Supreme Court of California has struck down zoning and land use regulations as applied or otherwise ruled in favor of property owners in land use disputes. *See Furey* v. *City of Sacramento*, 24 Cal. 3d 862, 157 Cal. Rptr. 684, 598 P.2d 844 (1979), *cert. denied*, 100 S. Ct. 476 (1979); *Youngblood* v. *Board of Supervisors*, 22 Cal. App. 3d 644, 150 Cal. Rptr. 242, 586 P.2d 556 (1978); *City of Imperial* v. *McDougal*, 19 Cal. 3d 505, 138 Cal. Rptr. 472, 564 P.2d 14 (1977); *San Diego Coast Regional Commission* v. *See the Sea, Ltd.*, 9 Cal. 3d 888, 109 Cal. Rptr. 377, 513 P.2d 129 (1973); *Selby Realty Co.* v. *City of San Buenaventura*, 10 Cal. 3d 110, 109 Cal. Rptr. 799, 514 P.2d 111 (1973).

the California courts have recognized that in appropriate instances injunctive relief includes not only striking down the regulation involved but ordering the agency to allow the proposed development. *See, e.g., Furey* v. *City of Sacramento, supra.*

Second, in *Bivens, Passman* and *Carlson* there were no considerations of federal-state relations since the defendants were all federal officials. *Compare Carlson* v. *Green, supra,* 100 S. Ct. at 1475 n.11. As discussed in detail below, those concerns are significant here.

Third, this Court in *Carlson* v. *Green, supra,* specifically recognized that no damage cause of action should be recognized where there are "special factors counseling hesitation in the absence of affirmative action by Congress." 100 S. Ct. at 1472. Where damages are sought for state or local land use regulatory actions there are a number of "special factors", specifically including, as discussed below, the "fiscal policy" questions which this Court suggested in *Bivens* could be an important reason not to allow a damage remedy. 403 U.S. at 396.

B. Implying a Damage Remedy Would Interfere with the Relationship Between Federal and State Authorities and Between the Courts and the Legislative Branch

In our system of government, the primary responsibility for determining what measures will promote the public welfare lies with the legislative branch and the courts pay substantial deference to the legislative judgment. Thus, this Court long ago explained, referring specifically to land use restrictions, that:

> "State legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character and degree of regulation which these new and perplexing conditions require; and their conclusions should not be disturbed by the courts unless clearly arbitrary and unreasonable." *Gorieb* v. *Fox,* 274 U.S. 603, 608 (1927).

For that reason, the state's legislative declaration of what the public interest requires is "well-nigh conclusive." *Berman* v. *Parker*, 348 U.S. 26, 32 (1954). *See also Village of Euclid* v. *Ambler Realty Co., supra*, 272 U.S. at 388; *Zahn* v. *Board of Public Works*, 274 U.S. 325, 328 (1927) ("[T]he settled rule of this Court is that it will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question.").[7]

In the present case—and in all those cases like it in which federal, state, or local governments have attempted to regulate—the Appellant and its supporters insist that this Court should substitute its judgment for that of the legislative branch as to whether to regulate or condemn. Appellant's supporters argue that, as they see it, invalidation of an overburdensome land use regulation is more disruptive of the relations between the judicial and other branches than is the award of damages. (*E.g.*, NAM Br. at 12-14). But the cases they cite in support of this proposition (*see* n.3, *supra*) recognize that it is an unwarranted intrusion into the legislative sphere for the courts to strike down legislation where the legislative branch has made a determination to proceed, with payment if necessary. It would be just as improper, where a legislature has decided or assumed that the remedy for a regulation which went "too far" would be invalidation, for the courts to tell the legislative branch that, much to the legislature's surprise, it has in fact used its eminent domain power and must pay damages.

Of course, it is the province of this Court and the lower courts to tell legislators when their regulatory schemes have overstepped permissible bounds and unduly interfered with protected private property rights. But as the

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[7] "The statement of the rule in *Zahn* remains viable today." *Moore* v. *City of East Cleveland*, 431 U.S. 494, 514 n.1 (1977) (Stevens, J., concurring).

cases discussed earlier make clear, the Court has uniformly deferred to the legislative judgment as to appropriate remedy.

Thus, as the Supreme Court of Pennsylvania recently pointed out in *Gary D. Reihart, Inc.* v. *Township of Carroll*, 409 A.2d 1167 (Pa. 1979), in refusing to permit a damage remedy for an alleged "taking" caused by unduly restrictive land use regulations when the state legislature had provided only remedies for injunctive and declaratory relief:

> "These [injunctive] procedures are, in the Legislature's judgment, the best means of balancing the interests of municipalities with those of land owners and others. To permit actions for damages in disputes over local subdivision planning, as Appellant urges, would surely undermine the Legislature's established procedures for resolution of controversies involving land use and development." 409 A.2d at 1170.

The result sought by the Appellant is particularly troublesome where state and local government is concerned. For example, in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), this Court struck down a congressional attempt to control state legislative decisions regarding payment of state and local government employees because of the interference with State and local government policy decisions:

> "Quite apart from the substantial costs imposed upon the States and their political subdivisions, the Act displaces state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require." 426 U.S. at 847.

This is precisely what the Appellants would have the Court do here.

As the First Circuit recently noted in *Pamel Corp.* v. *Puerto Rico Highway Authority, supra*:

> "Federal enforcement of the inverse condemnation remedy would be a singularly inappropriate intrusion

> into the states' traditional domains of property law and land use policy . . . [O]nce the Constitutional line has been drawn, the state or local authority administering the complex structure of land use controls should be free to decide whether the expected benefits from the restriction are worth the cost of the required compensation." 621 F.2d at 36.

The result urged by Appellant would be particularly unreasonable in the present case since the State of California has specifically forbidden cities such as San Diego from exercising the state-granted open space zoning ordinance power to "take" property by overregulation. Cal. Government Code § 65912. Thus, the California legislature has made a judgment that the zoning ordinance it has required cities to enact shall be within the permissible scope of the police power. It would be a unique step, indeed, for this Court to tell the City of San Diego that, because its open space zoning has overstepped the permissible bounds of regulation, it has bought the Appellant's property despite the specific legislative judgment not to use the eminent domain power in this instance. *Compare United States* v. *Clarke,* 100 S. Ct. 1127 (1980) (congressional decision to limit acquisition power to direct condemnation suits precludes "inverse condemnation" remedy).

The necessary conclusion is that a court may properly strike down a regulation which would be an invalid exercise of the police power because of its undue burden, but it may not transmogrify a police power regulation into an exercise of eminent domain when the legislative branch never intended to pay compensation.

C. Adopting a Damage Remedy Would Cause Wholesale Dislocation of Public Resources and Preclude Effective Governmental Regulation

Over the past 50 years, this Court has regularly sustained zoning and land use regulations and has repeatedly

recognized the validity of comprehensive land use planning for a broad variety of environmentally related purposes. *E.g., Penn Central Transportation Co.* v. *New York City,* 438 U.S. 104, 129 (1978); *Village of Belle Terre* v. *Boraas,* 416 U.S. 1 (1974).[8]

In light of the decisions of this Court, land use regulations have been acted by federal,[9] state and local authorities. Thus, every state has adopted zoning enabling legislation and almost every municipality in the United States has a zoning law of greater or lesser comprehensiveness. Anderson, *American Law of Zoning* § 2.21, at 62 (2d ed. 1976); 8 McQuillen, *The Law of Municipal Corporations,* § 25.04, at 10 (3d ed. 1976). In addition, many states and literally hundreds of cities and towns have enacted nonzoning land use regulations such as floodplain control, wetland and shoreland protection, coastal zone management, and historic preservation regulations. *See* J.A. Kusler, *Open Space Zoning: Valid Regulation or Invalid Taking,* 57 Minn. L. Rev. 1, 2 and 2 n.1 (1972); *Penn Central Transportation Co.* v. *New York City, supra,* 438 U.S. at 107.

The effect of a holding which now subjects every governmental agency that adopts or has adopted such regulations to the possibility of damages every time a court

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[8] "A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one. . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." 416 U.S. at 9.

[9] Among the federal programs are National Flood Insurance Program, 42 U.S.C. §§ 4001 *et seq.;* Federal Water Pollution Control Act, 33 U.S.C. § 1288 (land use controls) and § 1344 (wetlands controls); and Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201 *et seq. See* F. Bosselman, *Federal Land Use Regulation* (1977).

should find a regulation as applied in some particular situation oversteps constitutional bounds has staggering implications for governmental financial soundness and regulatory processes.

1. *A damage remedy threatens financial disaster.* Virtually every commentator on the subject has noted the potential financial consequences that would arise from this Court's requiring an "inverse condemnation" damage remedy. While forcing the City of San Diego in this case to pay more than $3 million it never intended to spend for property it never wanted to buy may not itself involve vast sums of money, the implications of such a decision are enormous. A few examples make the point quite clearly.

In *Horizon Adirondack Corp.* v. *State of New York,* 88 Misc. 2d 619, 388 N.Y.S.2d 235 (1976), New York had established an Adirondack Park Agency to regulate some 3.6 million acres of private land in the Adirondack Mountains. A land developer which owned 26,000 acres filed an "inverse condemnation" action seeking $35 million for its land on the theory that the Agency's regulations constituted a "taking." The New York court dismissed the case on the ground that "inverse condemnation" was not an appropriate remedy, noting that an award of damages under these circumstances would "have staggering implications upon the state budget and tax system . . . ." 88 Misc. at 630, 388 N.Y.S.2d at 244. Indeed, a damage award could have ultimately resulted in an unexpected liability of some $500 million to the State of New York.

In *Virginia Surface Mining and Reclamation Ass'n* v. *Andrus,* 483 F. Supp. 425 (W.D. Va. 1980), now pending before this Court, the trial judge held that the federal Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201 *et seq.,* constituted a "taking." Under the rule sought by Appellant, if this Court affirms presumably the United States will own all the nation's strip mines, with the only remaining question how many billions of dollars

the courts should award the former owners to pay them for the purchase of their property by what Congress thought was a regulatory scheme.

These are but examples of the kind of financial disasters which lie ahead if the Appellant's claims are accepted. Moreover, the impact upon the public treasury would not be limited to land use regulations, broad as that financial liability might be, because there is no difference in legal effect between a "taking" by a land use regulation and by other kinds of regulations.

For example, in *Andrus* v. *Allard,* 444 U.S. 51 (1979), the plaintiff brought suit to challenge the congressional regulatory scheme embodied in the Eagle Protection Act and Migratory Bird Treaty Act, 16 U.S.C. §§ 668 and 703 *et seq.,* and the regulations thereunder, which prohibited sale, trade, or barter of certain migratory birds and eagles, or parts thereof, even though the birds were lawfully acquired prior to the legislation. Plaintiffs, who were in the business of purchasing and selling Indian artifacts containing bird feathers, claimed that the effect of the statute was to "take" their property without just compensaion. On the merits, this Court found that no "taking" had occurred and that the regulatory scheme was not constitutionally defective. However, had the Court found that the regulations constituted a "taking," under the rule proposed by the Appellant the United States Government would have unintentionally and involuntarily purchased all Indian artifacts containing lawfully obtained bird feathers, a result which surely was the furthest thing from Congress' intention when it passed what it thought was a regulatory scheme.

As the Court is well aware, cities and towns throughout the country are hard pressed to raise enough revenue to keep their basic functions intact. *See, e.g.,* First National Bank of Boston, Economics Department, *Urban Financial Stress: A Comparative Analysis of Sixty-Six U.S. Cities*

(1979); U.S. Congress, Joint Economic Committee, *The Current Fiscal Condition of Cities: A Survey of 67 of the 75 Largest Cities* (1977). To be sure, such financial concerns do not authorize cities and towns to short-cut constitutional limits on the use of regulatory power, but they certainly do make it clear that this is not the time for the Court to impose potentially tremendous financial liability on units of local government for past and future regulatory mechanisms where the governmental agencies involved had no intention, and no idea, of spending their funds for what they thought were regulatory plans.

2. *A damage remedy will preclude effective government generally and land use regulation in particular.* This Court has recognized that the line between a permissible land use regulation and an unconstitutional overregulation will frequently depend on the facts of a given situation. *See Penn Central Transportation Co.* v. *New York City, supra*, 438 U.S. at 124. Indeed, even Appellant's most ardent supporters admit that whether a regulation is overly burdensome is often a highly factual inquiry and "there are simply no readily ascertainable and pragmatically applicable legal criteria" (NAM Br. at 7) to determine in advance if a regulation is or is not permissible. As this Court observed long ago in *Village of Euclid* v. *Ambler Realty Co., supra*:

> "'[P]roblems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive." 272 U.S. at 386-87.

Under these circumstances, it is hardly reasonable to require state and local legislatures to guess in advance as to all the possible factual permutations of a particular

regulation and to expose themselves to liability for huge damage awards if in retrospect they are judged to have guessed wrong. The combined effect of the absence of clear legal criteria and the prospect of substantial financial liability would impose such a great risk on local land use regulation as to bring regulatory activities to a virtual standstill.

Thus, as noted in Mr. Justice Rehnquist's concurring and dissenting opinion in *Butz* v. *Economou, supra*:

> "It simply defies logic and common experience to suggest that officials will not have this [*i.e.*, the availability of damages] in the back of their minds when considering what official course to pursue. It likewise strains credulity to suggest that this threat will only inhibit officials from taking action which they should not take in any event. It is the cases in which the grounds for action are doubtful, or in which the actor is timid, which will be affected. . . ." 438 U.S. at 526-27.

In the context of land use regulations, the California Supreme Court pointed out several years ago that

> "If a governmental entity and its responsible officials were held subject to a claim for inverse condemnation . . . the process of community planning would either grind to a halt, or deteriorate to publication of vacuous generalizations regarding the future use of land." *Selby Realty Co.* v. *City of San Buenaventura,* 10 Cal. 3d 110, 120, 109 Cal. Rptr. 799, 805, 514 P.2d 111, 117 (1973).[10]

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[10] The results of a recent survey of its members by Amicus National Association of County Planning Directors confirm this analysis. When presented with a hypothetical factual situation closely paralleling that held to be permissible regulation by this Court in *Goldblatt* v. *Town of Hempstead,* 369 U.S. 590 (1962) (closing of quarry through police power regulation), 48 percent of the nearly 300 respondents indicated that they would attempt to close the quarry and risk invalidation of their action, while only 8 percent said they would do so if confronted with the possibility of a damage award for excessive police power regulation. *See* National Association of County Planning Directors, *Zoning Survey Results* (September 1980).

Moreover, thoughtful commentators have uniformly reached the same conclusion. For example:

> "Availability of a remedy under inverse condemnation would inhibit the exercise of the police power. The possibility of incurring significant, unanticipated liability in money damages as a result of invalidation of a zoning ordinance in an inverse condemnation action would have a chilling effect on governmental experimentation in land-use controls. This inhibition would most severely affect rapidly growing communities—those that most need innovative land-use control, yet are least able to risk incurring such liability." Note, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance,* 26 Stan. L. Rev. 1439, 1450 (1974).

See also to the same effect 5 Williams, *American Land Planning Law* § 159.18 (1975) and § 158.09 (1979 Supp.);[11] L. Bozung, *Judicially Created Zoning With Compensation: California's Brief Experiment with Inverse Condemnation,* 10 Environmental Law 67 (1979); Note, *Eldridge* v. *City of Palo Alto: Aberration or New Direction in Land Use Law?,* 28 Hastings L.J. 1569 (1977).

However, Appellant and its supporters, citing this Court's recent decision in *Owen* v. *City of Independence,* 100 S. Ct.

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[11] Professor Williams states that while there may occasionally be extraordinary circumstances under which an "inverse condemnation" damage remedy would be appropriate, "real dangers would be involved in a proposal [such as that made by Appellant here] to expand inverse condemnation to play a major role in the whole system." Indeed, Professor Williams noted that allowing "inverse condemnation" would make regulation "financially impossible for a municipality" and would, as a result, "break the whole scheme of land use controls." 5 Williams, *American Land Planning Law* § 159.18 (1975). For that reason, Professor Williams specifically approved the reasoning of the California Supreme Court in *Agins* v. *City of Tiburon, supra,* "The court was clearly correct in its conclusion that any other conclusion would have severely inhibited needed public regulation." 5 Williams, *American Land Planning Law* § 158.09, at 44 (1979 Supp.).

1398 (1980), insist that the appropriate response to the fear of excessive acquisition of property and its concomitant cost to state and local governments is for government agencies to exercise care in the regulation of private property. (*E.g.*, Pacific Legal Foundation Br. at 22-27; NAM Br. at 16-17). They argue that in *Owen*, a Section 1983 action, this Court held that a municipality has no good faith immunity from liability for firing its police chief without a hearing, even if the municipality could not have forseen that its actions would be unconstitutional, and that the same principles should apply here.

But there are a number of compelling differences between *Owen* and the present case.

First, the actions of which Appellant complains in the present case are legislative—the enactment of rezoning and adoption of an open space plan by the San Diego City Council. This Court has always upheld immunity for legislative activities, recognizing that the legislative branch, at least, cannot function under threats of damage suits. *E.g.*, *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency, supra,* 440 U.S. at 402-05; *Tenney* v. *Brandhove,* 341 U.S. 367, 376 (1951); *see also Gorman Towers, Inc.* v. *Bogoslavsky,* —— F.2d —— (8th Cir. 1980) (municipality absolutely immune from liability under Section 1983 for legislative act of downzoning property).

Second, the rule Appellant seeks is in no way limited to municipalities, which the Court in *Owen* found traditionally had been treated differently from other governmental units for Section 1983 purposes. 100 S. Ct. at 1410-11. Instead, the damage rule sought by Appellant would apply equally to the State of California if, for example, its Coastal Zone Management Act as applied in some unforeseen circumstances were found to constitute a "taking," or to the federal government.

Third, there is a significant difference between the nature of the actions challenged in *Owen* and here. *Owen* involved

a single person, who had been fired without a hearing. The extent of the potential liability was not large, the rule of law involved was relatively clear (*i.e.*, if there is any doubt, have a hearing), and future compliance would neither be particularly costly nor require the municipality to forego important governmental functions.

As previously discussed, with land use regulations, on the other hand, there is no easy rule of law to follow. It is, therefore, completely counterproductive to discourage much needed innovative planning by imposing damage remedies, potentially on a widescale basis, for good faith regulation. Moreover, damages are particularly inappropriate with land use regulations where on the one hand an owner like Appellant insists that a regulation goes too far when development is not allowed in a floodplain, but other owners file lawsuits for damages if they are flooded when floodplain development is permitted. *See, e.g., Blau* v. *City of Los Angeles*, 32 Cal. App. 3d 77, 107 Cal. Rptr. 727 (1973).[12]

3. *A damage remedy will not promote other useful goals.* Appellant's supporters make a variety of claims to the effect that giving Appellant damages in this case will cure the nation's housing ills. The supposed salutary results range from discouraging racial discrimination (Pacific Legal Foundation Br. at 9-12) to encouraging cheap housing (NAHB Br. at 8-11) to avoiding insect damage to forests (NFPA Br. at 9-10). Of course, the present case has nothing to do with any of these issues. There is no question here as to racial discrimination, forest harvesting, or any housing, cheap or otherwise.

Instead, the main premise of Appellant and its supporters seems to be that there are too many limitations on land

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[12] Interestingly, the plaintiff's counsel in *Blau*, who argued that damages should be awarded for the City of Los Angeles' failure to preclude development in a floodplain, is the same as now argued on behalf of the NAM that the City of San Diego should pay damages for allegedly refusing to allow such development.

use in California and that these regulations have helped drive up the cost of land development, so that anything which would discourage regulation is useful. But, as Appellant's supporters admit elsewhere, all the California land use regulations of which they complain have been sustained as lawful. (*E.g.*, NAM Br. at 20-22). Thus, even assuming their premise is correct, the argument of Appellant's supporters is really that this Court should discourage California and other states from legitimate land use regulation by providing severe penalties for any misstep. However, the extent of regulation and the relative value accorded such factors as savings in housing costs, if any, as opposed to the deterioration in living conditions caused by unregulated urban sprawl, is properly a matter for consideration by the various state and local legislative bodies. Appellant's arguments on this subject should be made there, not here. *Compare National League of Cities* v. *Usery, supra; Pamel Corp.* v. *Puerto Rico Highway Authority, supra,* 621 F.2d at 36.

* * *

Amici submit that the creation of a damage remedy in the circumstances of the present case would be unprecedented, unwarranted, unwise, and contrary to longstanding policy governing the relationship between the judicial and legislative branches and between federal, state and local government. Until now this Court has uniformly left it to the legislative branch to determine, in the event that a regulatory scheme went "too far," whether to proceed and pay compensation or to abandon or change the regulation. In those cases where the legislature has made it clear that it intended to proceed and pay compensation, then compensation has been awarded. When, on the other hand, no compensation was intended, injunctive relief has been granted. That is the rule the California courts have properly followed below.

CONCLUSION

If this Court holds that there has been a "taking" and reaches the remedy issue, Amici believe for the foregoing reasons that the holding of the California Court of Appeal on the remedy issue should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A

The interests of Amici are as follows:

1. The National Trust for Historic Preservation is the leading national organization in the field of historic preservation. It was chartered by Congress in 1949 as a "charitable, educational, and nonprofit" corporation "to facilitate public participation in the preservation of sites, buildings, and objects of national significance or interest," and to preserve and administer historical properties significant in American history and culture for the public benefit. 16 U.S.C. § 468. The National Trust has more than 160,000 contributing members, including approximately 2,000 member organizations involved in local and regional historic preservation activities.

2. The National Association of Counties ("NACo") is a private, nonprofit organization that represents the interests of its approximately 1,900 member counties throughout the United States. County governments have a vital interest in regulating land use and thereby promoting orderly growth, protecting their local environments, controlling the costs of providing community services, and creating a diversity of housing opportunities. NACo believes that an adverse ruling in the instant case would severely interfere with legitimate land use regulation by county government.

3. The National Association of County Planning Directors ("NACPD") is a private, nonprofit organization, affiliated with the National Association of Counties. NACPD represents the interests of its approximately 1,000 members, who are the chief land use planning officers of their respective counties. NACPD has a vital interest in land use regulation as an important vehicle by which to protect the health, safety and welfare of local communities.

4. The National Wildlife Federation is a nationwide conservation organization dedicated to the restoration, wise

use and perpetuation of natural resources. Headquartered in Washington, D.C., the Federation has over 2,500,000 members and affiliate organizations in all 50 states, as well as Guam, Puerto Rico and the Virgin Islands. The Federation's membership in California is over 121,000, including the members of its affiliate, the California Natural Resources Federation. The Federation and its members and member groups, including the California Natural Resources Federation, have a long standing interest in ensuring that zoning regulation provides for critical area protection, rational land use planning and landmarks preservation.

5. Preservation Action is a nonprofit organization located in Washington, D.C. which actively participates in the legislative process. Preservation Action encourages the protection of historic buildings and districts, the protection of neighborhoods and the promotion of neighborhood conservation.

6. The National Parks and Conservation Association is a membership organization with approximately 35,000 members and contributors nationwide. The Association's main goal is the preservation and expansion of the National Park system. It is particularly concerned with the units of this system, but the Association has found that approximately two-thirds of the National Park system's units are adversely affected by incompatible land uses and activities outside their borders. The Association has concluded that in the long run one of the most promising solutions to these problems is the application of local land use laws, especially zoning, to prevent adverse uses and activities.